In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1441

JOSEPH PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the warrantless search of suitcases (which the officers had probable cause to believe contained marihuana) found in his automobile at the time of his arrest.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possession of marihuana, in violation of 21 U.S.C. 841(a)(1), and of assaulting a federal officer, in violation of 18 U.S.C. 111. He was sentenced to four years' imprisonment on the first count, and to three years' imprisonment on the second count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. 17-19).

1. At approximately 2:30 a.m., Chicago time, on September 23, 1971, a United States Customs Agent

in Arizona received information from a reliable informant that three persons in possession of a large quantity of marihuana had boarded an airplane in Arizona bound for Chicago (S. Tr. 9-11).[1] The informant described the baggage, gave the claim tickets' numbers, and furnished a physical description and the names of the three individuals (Tr. 7, 37-38). The agent contacted his liaison officer, who, in turn, contacted agents in Chicago (Tr. 4-5; S. Tr. 9-10). The group supervisor in Chicago contacted Agent Bushendorf at his home and relayed the information at 3:30 a.m. (S. Tr. 11). Agent Bushendorf was told that the flight was scheduled to arrive at 6:00 or 6:15 a.m. (S. Tr. 9). He contacted other agents and arranged to meet them at 5:30 at O'Hare Airport (Tr. 5, 9, 31).

Upon arrival at the airport three of the agents went to the baggage claim area to observe the unloading (Tr. 5-7). The suspects' suitcases with the designated claim numbers were observed by agents (Tr. 8). Other agents went to the baggage area and observed two men and a woman who appeared to fit the descriptions given by the informant (Tr. 10-11, 197). The suspects disembarked from the aircraft and the men went to the claim area (Tr. 12-13). The woman was greeted by petitioner (Tr. 11-12, 200-201). Together they left the terminal and went to a maroon 1962 Rolls Royce Classic (Tr. 12). The two men who had been waiting in the baggage claim area picked up the suitcases and brought them to the Rolls Royce (Tr. 13, 33-34). Two

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[1] "S. Tr." refers to the transcript of the proceedings on the motion to suppress on April 6, 1972.

"Tr." refers to the transcript of the proceedings at trial contained in six volumes paginated consecutively.

of the suitcases were placed in the trunk and one in the back seat (Tr. 15).

As petitioner entered the car and closed the car door, four agents converged on the vehicle (Tr. 16, 173, 206-217, 274). Three of the agents shouted "Federal Agents" and all four displayed their credentials (Tr. 16-18, 115). None of the agents had their guns drawn (Tr. 104). Petitioner then accelerated the car and bolted forward (Tr. 22, 227). The vehicle swerved to the left, knocked one of the agents to the ground and swerved to the right toward another agent who jumped to safety (Tr. 22, 177, 212, 214). The agents then pursued petitioner in two vehicles and apprehended him approximately one-half mile from the airport (Tr. 181). One agent made a brief search of the car's interior and removed the suitcase from the back seat (Tr. 25). Upon opening the suitcase he observed wrapped bricks of green plant-like material which resembled marihuana (Tr. 26). The other suitcases were opened and contained similar bricks (Tr. 27). At trial 46 pounds of marihuana which had been seized were introduced into evidence (Tr. 223, 279-280, 305).

2. Petitioner contends here as below that the search of the suitcases containing the marihuana was improper because it was made without a warrant and was a search "incident" to the arrest. The officers clearly had probable cause to believe the suitcases contained marihuana and would have been negligent had they failed to detain them. Under these circumstances the doctrine of *Chambers* v. *Maroney*, 399 U.S. 42, is applicable. As this Court pointed out in *Chambers*, *supra*, at 52:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car

before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The court below properly relied on *Carroll* v. *United States*, 267 U.S. 132, 153, 155-156, where this Court held that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant" if the officer has probable cause to believe the contraband is present.

Petitioner's reliance on *Coolidge* v. *New Hampshire*, 403 U.S. 443, and *Chimel* v. *California*, 395 U.S. 752, is misplaced. In *Coolidge* the car taken without a valid search warrant was parked in the driveway of the house where the defendant was arrested and was seized two and one-half hours after the arrest. The circumstances in *Coolidge* are different from those in *Chambers* and the present case, since in *Coolidge* the car was not being used to transport contraband, there was no reason to believe that the evidence in the car would be destroyed, the defendant was in custody and therefore could not flee, and there was ample time to obtain the warrant. In addition, *Coolidge* involved a general exploratory search, while in the present case the officers were pursuing contraband drugs that they had probable cause to believe were concealed in the suitcases.

In these circumstances, petitioner's attempt to rely on *Chimel* is erroneous because it is not necessary to reach the question whether the search of the suitcases here was also permissibly "incident" to the arrest. In *Chimel*, the sole issue was whether a warrantless search of petitioner's entire house could be

justified solely on the theory that it was "incident" to his arrest. But as this Court noted (395 U.S. at 764, n. 9):

> Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." [Citations omitted.]

Here, the agent in charge of the arrest at the airport had less than three hours to notify other agents, meet them at the airport, and arrange a surveillance. Under these circumstances a warrant was not required. See *United States* v. *Duke,* 369 F. 2d 355 (C.A. 7), certiorari denied, 386 U.S. 934. *United States* v. *Mehciz,* 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974; *Draper* v. *United States,* 358 U.S. 307.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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